Filed 3/27/19 P. v. Reyes CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. NOE ANTHONY REYES, Defendant and Appellant.	2d Crim. No. B280754 (Super. Ct. No. 2015036601) (Ventura County)

Noe Anthony Reyes was convicted by jury of robbery, assault with a deadly weapon, gang participation, burglary, vandalism, and taking a motor vehicle. On appeal he objects to (1) the prosecutor's peremptory challenges to prospective jurors, (2) the prosecutor's remarks during summation about appellant's gang tattoos, (3) the sentence imposed for both robbery and assault with a deadly weapon, and (4) a weapon enhancement to his sentence for assault with a deadly weapon.

We modify the sentence to strike the weapon enhancement, and otherwise affirm.

PROCEDURAL HISTORY

Appellant was charged with robbery (Pen. Code,[1] § 211; count 1); assault with a deadly weapon (§ 245, subd. (a)(1); count 2); active gang participation (§ 186.22, subd. (a); count 3); first degree residential burglary (§ 459; count 5); unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a); count 6); and vandalism (§ 594, subd. (b)(2)(A); count 7). The jury convicted him as charged, and found true allegations that he committed the crimes on behalf of a criminal street gang (as to counts 1, 2 and 6), and personally inflicted great bodily injury and used a deadly or dangerous weapon (as to counts 1, 2 and 3). (§§ 186.22, subd. (b), 12022.7, subd. (a), 12022, subd. (b)(1).)

The court sentenced appellant to 18 years 8 months in prison. For robbery, he was sentenced to the midterm of three years, plus a consecutive 10-year term for the gang enhancement. For assault with a deadly weapon, he was sentenced to a consecutive term of one year (one-third the midterm), plus three years four months for the gang enhancement. For active participation in a street gang, he was sentenced to the midterm of two years, to run concurrent with the robbery and assault terms. For burglary, he was sentenced to one year four months (one-third the midterm), to run consecutive to the term in counts 1 and 2. For taking a vehicle, he was sentenced to the midterm of two years, plus a three-year gang enhancement, to run concurrent with the robbery and assault terms; the court stuck the street terrorism enhancement on this count. For vandalism, he was sentenced to the midterm of two years, to run concurrent with the robbery, assault and burglary sentences. As to counts 1,

---

[1] All further unlabeled statutory references are to the Penal Code.

2 and 3, the court stayed the weapon and great bodily injury enhancements.

FACTS

1. Unlawful Taking of a Vehicle (Veh. Code, § 10851, subd. (a))

On the morning of November 17, 2015, a 1994 Honda Accord was taken from a mechanic's shop in Oxnard without the permission of its owner.

The Honda was recovered in Simi Valley two days later. Appellant's fingerprints were on the exterior doors and on a water bottle inside the car. DNA matching appellant's profile was found on two water bottles in the car. The interior of the Honda was marked with Colonia Chiques street gang graffiti, including appellant's gang moniker "Drips." The car contained no water bottles or graffiti before it was taken from its owner.

2. Burglary (§ 459)

Later that same day, appellant burglarized the Simi Valley residence of A.S. and her mother, M.G. Neither A.S. nor M.G. gave appellant permission to enter the home on the day of the burglary.

M.G. discovered the burglary. A window screen was removed and the front door was open. The house was a mess and items were missing, including a computer, gold rings, a car key, and a pack of water bottles of the same brand and size recovered by police in the Honda Accord.

3. Robbery and Assault With a Deadly Weapon (§§ 211, 245, subd. (a)(1))

Later the same evening, also in Simi Valley, R.J. was seated on the ground near his car, praying. Three men approached, whom he identified at trial as appellant and two

cohorts, D.D. and Gabriel Alamillo.[2] R.J. ignored their repeated requests for money until they kicked him in the leg. He told them he had no money and not to bother him during his prayers. Alamillo asked him "'[w]here are the West Siders at?'" When R.J. asked if they were gangsters, appellant said no and told Alamillo, "shut up, fool. . . . Don't say anything."

R.J. handed the men a $5 bill from the glove box of his car. He declined their request for a ride to Oxnard and their offer to "'do some drugs'" but offered them a pipe to smoke their marijuana. When R.J. opened the trunk of his car to retrieve the pipe, Alamillo took R.J.'s phone from his back pocket, then returned it at R.J.'s request.

The men surrounded R.J. D.D. removed the phone from R.J.'s pocket and they tussled over it. Appellant pulled a long metal object with an orange handle from his pants and struck R.J. in the head with it. R.J. blacked out and his head began to bleed. D.D. pushed R.J. to the ground. When he tried to stand, appellant struck R.J.'s arm with his weapon. R.J. tried to grab appellant to stop the attack, but appellant hit R.J. again on the head. Appellant said to R.J., "'Hey, shut up. Shut up. Chill. Don't--don't say anything. Give me--give me--give me your stuff.'" R.J. refused and began yelling loudly. Appellant said, "'let's get out of here, the cops. Let's go.'" The three men ran away. Alamillo returned, took R.J.'s phone, and followed his friends.

A bystander responded to R.J.'s cries for help and called 911. Police searched the vicinity and found a one- to two-foot long orange-handled crowbar or large screwdriver that had R.J.'s DNA on it. They also recovered his phone.

---

[2] Alamillo and D.D. are not parties to this appeal.

R.J. sustained two cuts on his head that required nine staples. Appellant stipulated that R.J. suffered great bodily injury. After the assault, R.J. discovered that a laptop computer was missing from the trunk of his car.

Not long after the attack, the three men approached J.P. in Simi Valley and asked for a ride to Oxnard. He refused. Appellant offered to sell J.P. a laptop computer. J.P. declined the offer. The three men walked away, toward the River Ranch apartment complex. J.P. alerted police to his interaction with the men. He identified appellant and Alamillo at trial.

Police detained appellant and his cohorts, who were running, hiding, and trying to climb a barrier between River Ranch and a flood control wash, less than half a mile from where R.J. was attacked. R.J. identified the three men as his assailants in a field show up. He told police that appellant struck him with a metal object and Alamillo took his phone.

4. Vandalism (§ 594, subd. (b)(2)(A))

On March 28, 2016, appellant was in a holding cell at the Ventura County Hall of Justice. A deputy noticed that the letters "COXCH" were deeply etched into the floor. Surveillance camera images showed appellant using the chain of his shackles to etch the floor.

5. Active Participation in a Gang (§ 186.22, subds. (a), (b))

Colonia Chiques is a street gang in Oxnard that engages in criminal activity, including robbery, violent assaults, and attempted murders. "COCH" is a short form of the gang name. Members use a five-point star as the gang symbol and refer to themselves as East Side and "ES," denoting their location east of Oxnard Boulevard.

Gang tattoos are "earned" by committing crimes on the gang's behalf. People who get gang tattoos without earning them are assaulted by other gang members. Appellant has multiple gang tattoos: a large "ES" on his chest; a five-point star on his finger; "CO" and "CH" on adjoining fingers; and three dots under his left eye and the webbing of his hand. The three dots signify "la vida loca" (my crazy life) and are traditional gang tattoos. People with gang tattoos that are not covered by clothing show "they're willing to put in a lot of work for their neighborhood."

A gang expert opined that appellant is an active participant in the Colonia Chiques street gang. Etching the gang's name in a custodial setting instills fear and intimidation in others and benefits the gang. Taking a car in Oxnard and leaving it in Simi Valley marked with gang graffiti creates fear and intimidation for residents, who realize that gang members are willing to come to their city; this benefits the gang. Going to another city, asking about a rival gang, then attacking someone with a weapon and robbing him benefits the gang because it shows that members are willing to go to another neighborhood looking for rivals and "win at all costs." Violent crimes, even those committed against nonrivals, give gang members "more credibility."

DISCUSSION

The Prosecution's Peremptory Challenges

Appellant first contends that his convictions should be reversed because the prosecution unlawfully removed four Hispanic women from the venire by the improper exercise of peremptory challenges. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) We disagree.

a. *General Principles*

"The prosecution's use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity, violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Blacksher* (2011) 52 Cal.4th 769, 801.) Women and Hispanics are cognizable groups. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 531-535 [women]; *People v. Sanders* (1990) 51 Cal.3d 471, 491 [Hispanics].)

"A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination." (*People v. Manibusan* (2013) 58 Cal.4th 40, 75.) "'The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant].' [Citation.]" (*Ibid.*; *People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); *People v. Winbush* (2017) 2 Cal.5th 402, 433 (*Winbush*).)

It is presumed that the prosecutor used peremptory challenges in a constitutional manner. (*People v. O'Malley* (2016) 62 Cal.4th 944, 975 (*O'Malley*).) When a prima facie showing is made that the prosecution excused venire members based on impermissible criteria, the prosecutor must provide a clear and

reasonably specific explanation of legitimate reasons for exercising the challenge. (*Batson*, *supra*, 476 U.S. at p. 98, fn. 20; *Winbush*, *supra*, 2 Cal.5th at p. 434.) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.4th 92, 136.) A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (*Winbush*, at p. 434; *Wheeler*, *supra*, 22 Cal.3d at p. 275.) A legitimate reason "is not a reason that makes sense, but a reason that does not deny equal protection." (*Purkett v. Elem* (1995) 514 U.S. 765, 769.)

"At the third stage of the *Wheeler*/*Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.]" (*Lenix*, *supra*, 44 Cal.4th at p. 613; see *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 (*Miller-El*).) The critical question is whether the defendant has proved purposeful discrimination because the prosecutor's reasons are so "'implausible or fantastic'" as to signal a pretext for discrimination. (*Miller-El*, at p. 339; *People v. Johnson* (2015) 61 Cal.4th 734, 755 (*Johnson*).)

"[T]he trial court's decision on the ultimate issue of discriminatory intent [in exercising a peremptory challenge] represents a finding of fact of the sort accorded great deference on appeal." (*Hernandez v. New York* (1991) 500 U.S. 352, 364 (*Hernandez*).) We examine the record to see if substantial evidence supports the ruling. (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

We must sustain the ruling if it is "correct in law" even if the court gave the wrong reasons for its decision. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

b. *The Prospective Jurors*

(1) A.A.

The court informed prospective jurors that the case involved gang activity and asked anyone who felt they could not be fair to step forward. A.A. stepped forward. She described herself as "fifty-fifty" on being biased.

A.A. stated that she is 20 years old, unemployed, single and mother of a toddler. Her brother was the victim of an unsolved armed robbery. One former boyfriend is "always in trouble with the law" and another is "actually . . . in prison or in jail." Both are involved in the Colonia Chiques gang and their crimes are gang-related. A.A. knew of their gang involvement "and I really didn't mind for it 'cause they chose that lifestyle," adding, "[t]hey would tell me and I really didn't care." She denied that her former boyfriends' gang affiliation or the robbery of her brother would affect her decision-making.

When defense counsel asked for detail about her ex-boyfriends' membership in Colonia Chiques, A.A. said she was "so nervous" and began stumbling over her words. A.A. currently knows "more than two" members of Colonia Chiques. She had no concerns about friends, family or ex-boyfriends being upset if she were a juror and found a Colonia Chiques member guilty. The prosecutor exercised a peremptory challenge to excuse A.A.

(2) S.D.

S.D. described herself as a stay-at-home wife with two grown children. When her son was in high school, he had to come home from school one day because of a racial fight between

gangs. Her friends' spouses work for the Oxnard Police Department. She served on a jury in a gang-related criminal case that ended in a hung jury and mistrial after a bitter battle in the jury room. The prosecutor exercised a peremptory challenge to excuse S.D.

(3) B.R.

B.R. is divorced, has three children, has not served on a jury and is a supervisor at the Navy base in Port Hueneme. Her brother was murdered by gang members in Oxnard in 1993; no one was arrested and the case was closed. At the time, there was gang warfare between Colonia Chiques and a rival gang, although to her knowledge her brother was not involved in a gang. It would not affect her if this case involved the same gang.

She has an image in her mind what a gang member looks like, but could set that aside and follow the law on what the prosecutor has to show to prove the defendants are gang members. She is accustomed to resolving disputes at home and at work, and is good at deciding witness credibility. The prosecutor exercised a peremptory challenge against B.R.

(4) E.C.

E.C. is married, has children and is a store manager at the Navy base in Port Hueneme, where her husband also works. She served on a jury in a domestic violence case and a verdict was reached. When she was young, her family's apartment was broken into and twice their car was broken into. Her daughter once had a knife pulled on her on a city bus in Oxnard. The police were called for the house burglary but not for the other incidents. She attended school in Los Angeles where there were a lot of gangs; however, she did not pay attention to that sort of activity, went to church, and participated in a leadership class

and in sports. Her experiences as a youth would not affect her judgment.

Her children's school had bars around it, but she has not experienced any gang problems in the 18 years she has lived in Oxnard. She would follow the law relating to gangs, even if it differs from what she thinks about gangs. She expressed concern that she may run into the defendants or witnesses in Oxnard; she could not honestly say if that would affect her deliberations as a juror and said it would be "in the back of my mind." The prosecutor exercised a peremptory challenge against E.C.

c. *The* Wheeler/Batson *Motion*

The prosecution's peremptory challenges drew a *Wheeler*/*Batson* motion from the defense, who noted that with the exception of one Spanish speaking woman excused by the defense, "every other Hispanic female has been removed from the jury panel by the prosecution," amounting to a prima facie showing of racial bias. The court agreed, finding that the prosecution made nine peremptory challenges, of which four were to female Hispanics. The court asked the prosecutor to explain why the challenges are race and gender neutral.

The prosecutor explained that he excused E.C. based on information that the jury on which she previously served voted to acquit. Also, she was concerned about seeing the defendants or witnesses in Oxnard. The court rejected the latter reason because E.C. denied that her concerns about seeing the defendants in public would affect her deliberations.

The prosecutor excused B.R. because she is a supervisor, divorced, and repeatedly "would not look at me coming or going from court." Further, "her strong personality and her position of power as a supervisor would not mesh well with the rest of the

jurors in reaching a unanimous verdict." Her answers were "terse" and did not impart enough information about her brother's homicide by gang members in Oxnard. The court accepted the reason that B.R. would not look at the prosecutor.

The prosecutor excused A.A. because two former boyfriends are members of Colonia Chiques, the same gang involved in this case, and their chosen life-style as gangsters did not bother her. The court accepted these reasons.

S.D. was excused after she described a jury room fight in a prior gang case in which the jury failed to reach a verdict. The court rejected the prosecutor's reason for excusing S.D. because "she sat on a hung jury in the past . . . I don't find that to be a sufficient statement."

In considering "the totality of the circumstances" regarding a *Wheeler*/*Batson* violation, the court stated, "I don't find any disingenuity on [the prosecutor's] part concerning his reasons." It concluded that the prosecutor's dismissal of E.C. and S.D. "is not enough . . . to establish a pattern of discrimination such as is required" and denied the defense motion. The court later clarified that there were race and gender neutral reasons for dismissing two jurors and also found the prosecutor "to be genuine in [his] thoughts."

d. *Analysis*

The prosecutor gave facially valid reasons for the peremptory challenges to all four jurors. The proffered rationales are legally recognized neutral reasons; they are not implausible or fantastic. (*Miller-El*, *supra*, 537 U.S. at p. 339; *Lenix*, *supra*, 44 Cal.4th at p. 613.) In the second phase of the *Batson* analysis, an explanation based on something other than the juror's race is deemed race neutral "[u]nless a discriminatory intent is inherent

in the prosecutor's explanation." (*Hernandez*, *supra*, 500 U.S. at p. 360.) The constitutionality of the challenge, based on the proffered reasons, presents a question of law. (*Id*. at p. 359.)

S.D. was excused owing to her service on a criminal case that ended in a hung jury. Prior service on a hung jury "constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict." (*People v. Turner* (1994) 8 Cal.4th 137, 170 (*Turner*); *Johnson*, *supra*, 61 Cal.4th at pp. 757-758 ["Prior service on a deadlocked jury is an accepted neutral reason for excusing a prospective juror"].) Our Supreme Court recognizes such a challenge "as the sort that sufficiently dispels any inference of discrimination." (*People v. Reed* (2018) 4 Cal.5th 989, 1001.)

A.A. volunteered that she is "fifty fifty" biased. A state of mind evincing enmity against or bias toward either party constitutes grounds for a challenge. (Code Civ. Proc., § 229, subd. (f).) She knows members of appellant's gang; her former boyfriends engaged in criminal activity with that gang; and she professes to not mind gang activity. The court accepted these reasons to excuse A.A. The ruling finds legal support. A prospective juror's contacts, association or relationship with gang members permits a peremptory challenge that is race-neutral. (*People v. Williams* (1997) 16 Cal.4th 153, 191 [juror's past exposure to and possible sympathy for gang members was disqualifying, despite his denial that it would affect him]; *People v. Watson* (2008) 43 Cal.4th 652, 679-680; *People v. Cox* (2010) 187 Cal.App.4th 337, 347-348 [juror formerly associated with members of the same gang as the defendants].)

B.R. repeatedly avoided eye contact with the prosecutor, had a personality that the prosecutor felt would not mesh well

with other jurors, and was not forthcoming about the gang homicide of her brother. The court accepted her failure to look at the prosecutor as a valid reason.

"It is well settled that '[p]eremptory challenges based on counsel's personal observations are not improper.' [Citation]." *People v. Reynoso* (2003) 31 Cal.4th 903, 917 (*Reynoso*); *People v. Hardy* (2018) 5 Cal.5th 56, 82 [panelist did not smile at the prosecutor].) A panelist may be excused for showing a hostile or negative attitude toward the prosecutor or a party. (*People v. Ward* (2005) 36 Cal.4th 186, 202 [prosecutor mistrusted juror because she was "'uptight'" with him]; *People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [failure to make eye contact]; *People v. Phillips* (2007) 147 Cal.App.4th 810, 819 [alienating looks are a neutral reason to excuse a panelist].)

Appellant and Queen's Bench Bar Association of the San Francisco Bay Area as Amicus Curiae on behalf of appellant object to the prosecutor's mention of B.R.'s status as a divorcee, her supervisorial position and strong personality. None of these reasons moved the trial court, which based its determination on the panelist's attitude or behavior towards the prosecutor. In any event, describing a female panelist as "defensive" and "overbearing" does not make a prosecutorial challenge impermissible. (*People v. Jones* (2011) 51 Cal.4th 346, 359, 368.)

E.C. disclosed her service on a criminal jury that reached a verdict. The prosecutor advised the court that his wife tried the case, and the verdict was not guilty. The prosecutor may excuse a prospective juror who previously served on a jury that acquitted a criminal defendant, as this is a valid, race-neutral reason. (*United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260,

cited with approval in *People v. Taylor* (2010) 48 Cal.4th 574, 644.)

Alamillo's attorney objected to the prosecutor's use of outside information. A prosecutor's statements about a panelist's background may be derived from information outside the record. (*People v. Jones*, *supra*, 51 Cal.4th at pp. 358, 366 [after venireman stated that his son was accused of an unspecified crime, the prosecutor told the court "'I think it was attempt murder or murder'"].) Prosecutors "have substantially more information concerning prospective jurors than do defense counsel," but defense counsel may receive access to jury records. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 766-767; *People v. Pride* (1992) 3 Cal.4th 195, 227; Code Civ. Proc., § 237, subd. (b).) A prosecutor is not required to give defense counsel information in his or her possession concerning the jurors on the panel and how they voted during prior service. (*People v. Superior Court* (1959) 175 Cal.App.2d 830, 832.)

E.C. also voiced concern about seeing the defendants or witnesses where she lives. She could not honestly say if it would affect her as a juror, but admitted that it would be "in the back of my mind." A juror's "seeming reluctance to serve" is a race-neutral reason to excuse the juror. (*People v. Cash* (2002) 28 Cal.4th 703, 725.) The court did not find this reason disingenuous; rather, it did not understand that this is a legally-accepted neutral reason to excuse a panelist.

Moving to the credibility finding, the court found that the prosecutor was *not* disingenuous and was "genuine in your thoughts." "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis." (*Hernandez*, *supra*, 500 U.S. at p. 367.) "All that matters is that the prosecutor's

reason for exercising the peremptory challenge is sincere and legitimate" and subjectively genuine. (*Reynoso*, *supra*, 31 Cal.4th at p. 924; *O'Malley*, *supra*, 62 Cal.4th at p. 975.) Instead of believing that the prosecutor offered pretextual reasons to hide discrimination, the court mistakenly believed that the reasons were legally insufficient. The reasons are, however, legally sufficient, inherently plausible and supported by the record. Thus, the court's ultimate ruling denying the *Wheeler*/*Batson* motion was legally correct because the prosecutor's reasons were facially valid and supported by substantial evidence. Appellant did not carry his burden of showing purposeful discrimination.

Prosecutorial Error[3]

Appellant argues that the prosecutor made unsupported claims during summation about appellant's acquisition of gang tattoos. However, the prosecutor merely echoed appellant's counsel, who argued that appellant acquired his tattoos after November 17, 2015. There was no error here.

The prosecution has significant leeway in arguing the merits of the case. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203; *People v. Centeno* (2014) 60 Cal.4th 659, 666.) In reviewing the whole argument, we determine if "there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous matter. [Citations.]'" (*Centeno*, at p. 667.) We do not infer that the jury drew the most damaging meaning from the statements. (*Ibid*.)

---

[3] The term "prosecutorial 'misconduct'" is "a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The prosecutor first argued that appellant "was committing crimes for the benefit of and in association with the Colonia Chiques gang and . . . gang members on November 17th. That's active participation. . . . [¶] And . . . he earned his gang tattoos. He's got the Colonia Chiques gang tattoos on his hands and . . . on his chest." The prosecutor did not say if appellant acquired the tattoos before or after his crimes.

Appellant's attorney countered, "[w]e have no evidence whatsoever of [appellant] being in the Colonia Chiques street gang in November of last year." While admitting that the jail vandalism captured on camera in March 2016 was gang related, counsel maintained that "November 17th was a very different era in [appellant's] life" that preceded his gang membership. Counsel asserted that "something changed" between the time appellant was arrested and the time he was seen carving into the jail floor four months later. Specifically, "[y]ou have a guy who now has tattoos, East Side tattoos on him. Tattoos on his face. . . . [¶] If you look at the evidence, the pictures from November 17th, there's no tattoos on [appellant's] face. In fact, there's not as many tattoos on [him] at all."

In rebuttal, the prosecutor adopted appellant's argument that his tattoos were of recent vintage. He stated, "we didn't hear about [appellant's] gang tattoos when he was arrested, but what we know is that he earned those tattoos. Since he was in custody, he got those tattoos. He got the East Side, ES on his chest. He got the COCH, the star and the ES on his hands. He earned those tattoos. And he earned those tattoos for the work that he put in in Simi Valley on November 17th." Appellant's counsel objected that this was "speculation. There's no facts remotely supporting that." The court overruled the objection.

The court admonished the jury that "'[n]othing that the attorneys say is evidence'" and that in closing argument "'the attorneys discuss the case but their remarks are not evidence'" but "'advocacy.'" We must presume that the jury followed the court's instructions. (*People v. Lewis* (2001) 26 Cal.4th 334, 390.) The court returned to appellant's objection, outside the jury's presence. It told appellant's counsel, "I didn't hear any evidence that supported your argument in your closing that . . . he received those tattoos since [his arrest]." It deemed the prosecutor's statements "an appropriate comment in response to your argument."

It was not prosecutorial error to echo appellant's argument that he acquired his tattoos after the crimes were committed on November 17, nor was it error to argue that appellant "earned" the tattoos with the crimes he committed on that date. These were reasonable inferences that could be drawn from the evidence. The prosecutor's statements were a fair comment or inference. (*People v. Jones* (1997) 15 Cal.4th 119, 188-189 [prosecutor could argue that two murder victims "felt terror and pain" despite being immediately rendered unconscious by the defendant's hammer blows because their feelings could be inferred].) Moreover, "nothing . . . forecloses the prosecutor's right to meet the issues within the scope of the record and defense counsel's argument." (*People v. Hill* (1967) 66 Cal.2d 536, 564.)

Based on a review of the entire summation, we conclude that the prosecutor's adoption of appellant's argument regarding his gang tattoos was not "'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process' [citations]" nor does it involve the use of deceptive or

reprehensible methods to persuade the jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Multiple Punishments

Appellant argues that his sentence violates a proscription barring multiple punishments arising from two or more offenses incident to one intent and objective. (§ 654; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) We disagree.

Section 654 "prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) However, "[a] defendant may not bootstrap himself into section 654 by claiming that a series of divisible acts, each of which had been committed with a separate identifiable intent and objective, composes an 'indivisible transaction.'" (*People v. Massie* (1967) 66 Cal.2d 899, 908.)

Multiple offenses are not subject to section 654 if they are divisible in time "during which reflection was possible," or if each offense creates a new risk of harm. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689 (*Surdi*); *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1256.) A trial court's determination that two crimes are separate must be upheld if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Appellant posits that his sentence for assault with a deadly weapon should be stayed because the offense was committed with the same intent and objective as the robbery. The court found, however, that appellant "inflicted great bodily injury on a very vulnerable victim, and that *the infliction of great bodily injury was completely unnecessary to complete the robbery. It was just for fun* . . . . That's the way I look at it." (Italics added.)

The evidence shows that appellant had no need to resort to violence, because Alamillo twice took R.J.'s phone without hitting

the victim. Nevertheless, appellant struck R.J. three times with a long metal object. When R.J. began yelling for help, appellant fled to avoid apprehension. Alamillo started to leave, but returned to R.J. and stole his phone. There was "a break in the action" after appellant committed one crime (the assault), ran away to avoid arrest, then his accomplice returned to commit a different crime (the robbery). (*Surdi*, *supra*, 35 Cal.App.4th at p. 689 [it is not a single act if, after a codefendant stabbed the victim, the group took a break while the defendant strapped down the victim and discussed abandoning the attack, then resumed stabbing the victim].)

The court could reasonably conclude that appellant had one motivation to commit a violent crime: "for fun" or to gain recognition and credibility in his gang. He had a second motivation for the robbery: to obtain money to return to Oxnard. Substantial evidence supports the court's imposition of separate sentences for the assault and the robbery. (See *People v. Tarris* (2009) 180 Cal.App.4th 612, 627 [we presume the existence of every fact that can reasonably be deduced from the evidence to support the court's determination].)

Weapon Use Enhancement

Appellant contends that the court erroneously failed to strike a weapon use enhancement attached to his conviction for assault with a deadly weapon. (§§ 245, 12022, subd. (b)(1).) The Attorney General concedes that the enhancement must be stricken because use of a deadly weapon is an element of the crime of assault with a deadly weapon. We agree. (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1069-1070.)

DISPOSITION

The judgment is modified to strike the personal weapon use enhancement to count 2. (Pen. Code, §§ 245, 12022, subd. (b)(1).) The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Nancy L. Ayers, Judge

Superior Court County of Ventura

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Hanson Bridgett, Megan Oliver Thompson, Josephine K. Mason, Payam A. Saljoughian, Ann Mary Olson, Laurel E. O'Connor and Lauren N. Holton for Queen's Bench Bar Association of the San Francisco Bay Area as Amicus Curiae on behalf of Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.